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No. 09-531

IN THE
Supreme Court of the United States

HASKELL COUNTY BOARD OF COMMISSIONERS, ET AL.,
Petitioners,

v.

JAMES W. GREEN, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE AMERICAN LEGION DEPARTMENT OF CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. WHETHER THE PLAINTIFF HAS DASHED TO THE COURTHOUSE IS IRRELEVANT TO CONSTITUTIONALITY UNDER THE ESTABLISHMENT CLAUSE 5

II. A DASH-TO-THE-COURTHOUSE RULE WILL RESULT IN AN IMPERMISSIBLE HECKLER'S VETO 8

III. A DASH-TO-THE-COURTHOUSE RULE WILL PRODUCE INCONSISTENT RESULTS 10

CONCLUSION 13

TABLE OF AUTHORITIES

Cases **Page(s)**

Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973) 11

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) 6, 8, 9

Card v. City of Everett, 520 F.3d 1009 (9th Cir. 2008) 5

Cone v. Bell, 129 S. Ct. 1769 (2009) 6

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) 9

Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) 4, 9

Green v. Haskell County Bd. of Comm'rs, 568 F.3d 784 (10th Cir. 2009) 2, 3, 12

Green v. Haskell County Bd. of Comm'rs, 574 F.3d 1235 (10th Cir. 2009) 9

Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005) 10

Lemon v. Kurtzman, 403 U.S. 602 (1971) 6

Lynch v. Donnelly, 465 U.S. 668 (1984) 6

McCreary County, Ky. v. American Civil Liberties Union of Ky., 545 U.S. 844 (2005) 7, 12

Cases (cont.) **Page(s)**

Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125 (2009) 11

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) 6

Van Orden v. Perry, 545 U.S. 677 (2005) ..... passim

Wallace v. Jaffree, 472 U.S. 38 (1985) 6

Weinbaum v. City of Las Cruces, 541 F.3d 1017 (10th Cir. 2008) 5

Statutes and Regulations **Page(s)**

Supreme Court Rule 37.2(a) 1

Supreme Court Rule 37.6 1

Other Authorities Sources **Page(s)**

Edith Brown Clement, *Public Displays of Affection . . . For God: Religious Monuments After* McCreary & Van Orden, 32 HARV. J.L. & PUB. POL'Y 231 (Winter 2009) 11

Matthew Morrison, *The* Van Orden *and* McCreary County *Cases: Closing the Gaps Remaining Between the Established Lines of Ten Commandments Jurisprudence*, 13 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 435 (Spring 2007) 7

INTEREST OF *AMICUS CURIAE*[1]

The American Legion Department of California (the "Department of California") represents approximately 130,000 Legionnaires organized in posts, districts, and areas throughout California. In 1919, Congress chartered the American Legion as a patriotic, mutual-help war-time veterans organization. Since its inception, the American Legion has maintained an ongoing concern for and commitment to veterans and their families, and it has been a tireless advocate for veterans' rights. It is dedicated to preserving American values, promoting patriotism, and encouraging selfless service and sacrifice among citizens. It honors men and women of our armed forces who have already sacrificed for our country, supports those who continue to sacrifice for our country today, and prepares those who will be called to sacrifice for all of us in the future.

Veterans' memorials and monuments are proud expressions of gratitude and remembrance intended to honor these brave men and women. Some of these memorials and monuments have stood for decades, while others are relatively new or yet to be built. Some of these memorials and monuments are now, or have been, the subject of challenges under the Establishment Clause of the United States Constitution.

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[1] All counsel of record have received notice pursuant to Supreme Court Rule 37.2(a) and have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no portion of this brief was authored by counsel for a party, and no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

The Department of California has established the Defense of Veterans Memorials Project to defend California's veterans memorials and monuments that are now or may become subjects of litigation. Although this petition arises from a Ten Commandments monument in Haskell County, Oklahoma, the Department of California has a significant interest in this case because the analysis and outcome here could affect veterans' memorials and monuments nationwide.

INTRODUCTION AND SUMMARY OF ARGUMENT

There is nothing in the Establishment Clause, or in this Court's Establishment Clause jurisprudence, that supports the notion that a memorial or monument that includes religious symbolism is more likely to be unconstitutional if someone rushes to the courthouse to file a challenge within a few days, months, or years after the monument is first displayed. Such a hurried challenge may indicate that the plaintiff finds the monument objectionable, but it does not show that a reasonable observer would view the monument as divisive or having a religious purpose.

Despite this, the Tenth Circuit concluded that the Ten Commandments monument in Haskell County, Oklahoma, violates the Establishment Clause because James Green filed his lawsuit "less than one year after the Monument was unveiled." *Green v. Haskell County Bd. of Comm'rs*, 568 F.3d 784, 807 (10th Cir. 2009); *see also id.* at 791-92 (noting that the monument was unveiled in November 2004 and that Mr. Green filed his challenge in October 2005). The court of appeals brushed aside the similarities between the Haskell County monument and the one

upheld by this Court in *Van Orden v. Perry*, 545 U.S. 677 (2005). The Tenth Circuit instead focused on "the sharp contrast between the timing of the legal challenges to the monument in *Van Orden* and the one in this case," *Green*, 568 F.3d at 806, and concluded that Mr. Green's hurried challenge to the Haskell County monument "shed[s] significant light on whether the reasonable observer would have perceived [it] as having the effect of endorsing religion," *id.*

The Tenth Circuit's dash-to-the-courthouse rule purports to come from Justice Breyer's concurring opinion in *Van Orden*, where he found the fact that a monument had stood on the grounds of the Texas State Capitol without legal challenge for forty years was dispositive of the constitutional challenge. *Van Orden*, 545 U.S. at 702-04 (Breyer, J., concurring in the judgment). But the *inverse* of that proposition—that a monument that *is* challenged quickly is more likely to be unconstitutional—does not flow from Justice Breyer's opinion. Nor does it make any sense.

First, a rush to the courthouse is not a factor with any pedigree from either the Establishment Clause itself or this Court's Establishment Clause jurisprudence, which focuses on determining whether a monument has a secular or religious purpose. Nothing in the Establishment Clause or this Court's cases supports the Tenth Circuit's notion that a hurried challenge to a monument (or, for that matter, a statute or governmental practice) reflects an unconstitutional religious purpose or promotes divisiveness. If allowed to stand, the dash-to-the-courthouse rule will inundate federal courts with

Establishment Clause cases. Plaintiffs will file prematurely, well before the facts essential to the reasonable observer test are developed.

Second, the Tenth Circuit's reasoning improperly encourages a form of heckler's veto. It allows the most sensitive members of society to dictate what sorts of monuments may be displayed on government property, even though this Court has repeatedly endorsed a *reasonable* observer test in the context of the Establishment Clause. In fact, this Court has refused to permit a heckler's veto in Establishment Clause cases and other aspects of its First Amendment jurisprudence. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). But under the Tenth Circuit's rationale, hecklers can successfully challenge monuments (or statutes or practices) that have any arguable religious implications simply by rushing to the courthouse.

Third, the Tenth Circuit's decision, if allowed to stand, will result in inconsistent outcomes for similar monuments of different longevities. Courts will be more likely to uphold older monuments that incorporate religious symbolism and more apt to strike down newer ones that are challenged soon after they are displayed. For example, newly installed grave markers, or stand-alone monuments, adorned with the Christian cross or the Star of David at a national cemetery may be declared unconstitutional as long as someone is willing to bring the lawsuit quickly, but older grave markers of those who died generations ago will be upheld simply because they have not been the subject of litigation. Likewise, the frieze in this Court's courtroom, complete with the image of Moses holding the Ten

Commandments, presumably does not violate the Establishment Clause. Yet a state replica of the same frieze in a new or refurbished courtroom could be declared unconstitutional.

This case warrants this Court's review not only because (as shown in the petition) there is a conflict among the courts of appeals, but also because this case raises important constitutional issues that affect all state and local governmental units.

ARGUMENT

I. WHETHER THE PLAINTIFF HAS DASHED TO THE COURTHOUSE IS IRRELEVANT TO CONSTITUTIONALITY UNDER THE ESTABLISHMENT CLAUSE

The fact that a monument has stood without legal controversy for a long time may indicate a number of things: that a reasonable observer would conclude that the monument has a secular purpose; that the monument does not have a divisive effect; or that there is a historic lack of complaints. *See Van Orden*, 545 U.S. at 701-03 (Breyer, J., concurring in the judgment) (instructing that the passage of a long period of time before a lawsuit can weigh in favor of constitutionality); *see also Card v. City of Everett*, 520 F.3d 1009, 1021 (9th Cir. 2008) (noting that complaints against the challenged Ten Commandments monument "did not surface until the monument had been in place for over thirty years"); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1035 n.20 (10th Cir. 2008) (holding that crosses on a long-standing city seal did not violate the Establishment Clause: "We note here that the use of three crosses in the City seal has gone legally

unchallenged for at least forty years.") (citing *Van Orden*).

But none of this Court's Establishment Clause tests, whether under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984), or Justice Breyer's concurrence in *Van Orden*, suggests that a monument is, or is more likely to be, unconstitutional simply because someone launches a challenge soon after its dedication. Even assuming that a monument's longevity without challenge weighs in favor of constitutionality, the inverse proposition embraced by the Tenth Circuit—that a new, quickly challenged monument is more likely to be unconstitutional—does not logically follow. *Cf. Cone v. Bell*, 129 S. Ct. 1769, 1784 (2009) (holding that "[e]vidence that is material to guilt will often be material for sentencing purposes as well; the converse is not always true, however," as evidence material to sentencing is not necessarily material to guilt).

A plaintiff's hurried challenge stops far short of proving a reasonable observer's judgment or the amount of divisiveness within the community overall. It merely represents the subjective opinion of the individual filing the suit. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) ("[O]ne of the relevant questions is 'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.'") (quoting *Wallace v. Jaffree*, 472 U.S. 38, 73 (1985) (O'Connor, J., concurring in the judgment)); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring in

part and concurring in the judgment) ("[B]ecause our concern is with the political community writ large, the endorsement inquiry is *not about the perceptions of particular individuals* or saving isolated nonadherents from . . . discomfort . . . . It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech takes place].").

Indeed, although this Court noted as background in *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005), that the lawsuit was filed just months after the challenged monuments were unveiled to the public, it did not consider the lawsuit's timing as a factor in the constitutional analysis—much less a controlling factor. *See id.* at 851-52 (the counties unveiled their monuments in the summer of 1999, and the plaintiffs filed their lawsuit in November 1999).

Furthermore, the Tenth Circuit's dash-to-the-courthouse test raises many more unresolved questions than it answers. For example, courts must now decide how long a monument must stand before it can pass constitutional scrutiny—a difficult task because the First Amendment is silent on this issue. The Tenth Circuit's opinion in this case suggests that one year is not enough. But what about two years? Five? Ten? The constitutionality of a monument depends on whether it has a religious or secular purpose, not on the arbitrary timing of the first lawsuit and random legal line-drawing. *See* Matthew Morrison, *The* Van Orden *and* McCreary County *Cases: Closing the Gaps Remaining Between the Established Lines of Ten Commandments*

Jurisprudence, 13 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 435, 448-49 (Spring 2007) ("It is questionable whether courts should be in the business of assessing what length of time constitutes an adequate history to withstand challenge under the Establishment Clause.") (footnote omitted).

If it stands, the Tenth Circuit's opinion will embolden future plaintiffs to file Establishment Clause challenges immediately in order to benefit from this dash-to-the-courthouse rule. The result will be federal court dockets across the country loaded with Establishment Clause challenges to new monuments, statutes, and governmental practices; cases filed prematurely and without the full factual development necessary to execute the reasonable observer test; and inconsistent results among similar monuments based solely on the monuments' varying longevities.

II. A DASH-TO-THE-COURTHOUSE RULE WILL RESULT IN AN IMPERMISSIBLE HECKLER'S VETO

This Court strongly disfavors the "heckler's veto": government suppression of speech to avoid the reaction of a heckling listener. *See Capitol Square Review & Advisory Bd.*, 515 U.S. at 779-80 (O'Connor, J., concurring in part and concurring in the judgment). By focusing on the promptness of litigation, however, the Tenth Circuit's decision in this case encourages hecklers to exercise a veto in Establishment Clause cases by essentially requiring courts to strike down monuments that are challenged soon after they are unveiled to the public. The Tenth Circuit's opinion in *Green* encourages hecklers to file suit immediately after the unveiling

of a government monument with any arguable religious connotations. *See Green v. Haskell County Bd. of Comm'rs*, 574 F.3d 1235, 1239 (10th Cir. 2009) (Kelly, J., dissenting from the denial of rehearing en banc) (explaining that the opinion allows a heckler's veto).

Furthermore, "[b]y treating the presence of litigation as having controlling weight, the court comes perilously close to creating a new bright-line rule: all new Ten Commandments displays are unconstitutional as long as someone is willing to exercise a heckler's veto by filing suit." *Id.* As a practical matter, someone will almost always be willing to file suit. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring in the judgment) ("Nearly any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement."); *Capitol Square Review & Advisory Bd.*, 515 U.S. at 780 ("There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion.") (O'Connor, J., concurring in part and concurring in the judgment).

This Court has generally refused to allow the heckler's veto in First Amendment cases and, in particular, has held that a heckler should not be allowed a veto in the Establishment Clause context. In *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), the Court "decline[d] to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the

youngest members of the audience might misperceive." *Id.* at 119; *cf. Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) (rejecting a heckler's veto in the free speech context).

Similarly, a Ten Commandments monument should not be struck down on the basis of what the most sensitive and litigious members of the public might perceive. An Establishment Clause analysis that turns on what such members perceive cannot coexist with this Court's longstanding "reasonable observer" test and cannot be reconciled with the "divisiveness" approach taken by Justice Breyer in *Van Orden*. The rule announced by the Tenth Circuit will do just what this Court's decision in *Good News Club* and the reasonable observer test seek to avoid: it will give sensitive plaintiffs veto power.

III. A DASH-TO-THE-COURTHOUSE RULE WILL PRODUCE INCONSISTENT RESULTS

Treating a short passage of time before a monument is challenged as a critical factor under the Establishment Clause will result in inconsistencies in constitutional outcomes for older and newer monuments. As one author has noted:

> Although the Texas monument was not the subject of litigation before *Van Orden*, at least one identical monument placed by the Eagles in Salt Lake City, Utah was the target of lawsuits in the 1970s. If divisiveness truly is dispositive, then the Utah monument could be unconstitutional even though

> its substance and genesis are indistinguishable from the Texas monument in *Van Orden*.

Edith Brown Clement, *Public Displays of Affection . . . For God: Religious Monuments After* McCreary & Van Orden, 32 Harv. J.L. & PUB. POL'Y 231, 245 (Winter 2009) (citing *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 30 (10th Cir. 1973)) (footnote omitted).

For example, existing gravestones and stand-alone monuments at Arlington National Cemetery and other national cemeteries bearing the Christian cross or the Star of David might survive a constitutional challenge because of their longevity. *Cf. Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1142 (2009) (Souter, J., concurring in the judgment) (discussing the constitutionality of "[s]ectarian identification on markers in Arlington Cemetery" under the Establishment Clause analysis). Yet new gravestones and stand-alone monuments with the same symbols may not withstand Establishment Clause scrutiny if challenged within days or months of being constructed.

The sarcophagus at the Tomb of the Unknowns at Arlington bears the inscription:

HERE RESTS IN
HONORED GLORY
AN AMERICAN
SOLDIER
KNOWN BUT TO GOD

That inscription has existed without an Establishment Clause challenge since its

construction in 1932. Under the Tenth Circuit's logic, it is far from clear whether the same inscription on a new sarcophagus dedicated to unknown soldiers lost in the Iraq or Afghan wars would survive challenge.

The time factor also proves unworkable when one jurisdiction seeks to replicate another's display. For example, a state supreme court might decide to construct for its courtroom a replica of the courtroom frieze that was mentioned in both *Van Orden* and *McCreary County*. *Van Orden*, 545 U.S. at 688; *McCreary County*, 545 U.S. at 874. Or a state or local government might accept a donated replica of the Texas State Capitol's Ten Commandments monument for display on government property. In either case, if someone promptly files suit, the reviewing court might well find the display unconstitutional.

These hypothetical examples illustrate how the time factor may produce inconsistent and arbitrary results. By standing for decades without a challenge, old displays have a higher likelihood of passing Establishment Clause muster. *See Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in the judgment). But newer, identical displays risk being declared unconstitutional by a court persuaded that a quick-on-the-draw plaintiff represents the reasonable observer. *See Green*, 568 F.3d at 807. The fact that two identical monuments standing side-by-side on a courthouse lawn might, because of their ages, face different constitutional fates suggests that the constitutional principle identified by the Tenth Circuit is not well grounded.

CONCLUSION

This case demonstrates the inevitable problems with relying on a short passage of time to invalidate a monument under the Establishment Clause. Under the Tenth Circuit's logic, the monument in Haskell County must come down because a heckler challenged its existence within the first year. This result cannot be reconciled with *Van Orden*, which declared a similarly designed monument constitutional, or with any other Establishment Clause case decided by this Court. Nor can this result find support in the Constitution. Moreover, the issue is important and affects state and local governments and concerned citizens around the country.

This Court should grant the petition for certiorari and reverse the decision of the Tenth Circuit.

Respectfully submitted,

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